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Ohio and Maryland courts in the above cases in specific language and it is made a feature of the case of Cripps *v.* Wolcott which makes the departure from the old rule by the English courts, and of the rule announced in 30 Am. & Eng. Ency. of Law, 808; in Jarman on Wills, in Schoulder on Wills, and other text writers.

Upon the foregoing authorities, the gift, in the clause of the will under discussion, being immediate, the period of survivorship refers to the death of the testator, and the two beneficiaries take undivided moieties in fee upon the happening of that event. In the particular case, it is known that the testator and the draughtsman both believe that, upon the death of the testator, the clause devised a life estate to each of the devisees with remainder over to the survivor of them, and the testator died under this belief. The clause presents a striking illustration of the probity of Vice Chancellor Wood's warning, that "this word 'survivor' is certainly one that ought to be avoided by any person who is not a consummate master of the art of conveyancing."

J. T. LAWLESS.

Norfolk, Va., March 19, 1908.

REMOVAL OF JUDGES BY THE LEGISLATURE.

It is proposed in this article briefly to consider and construe § 104 of the Virginia Constitution of 1902, which is as follows:

> "Judges may be removed from office for cause, by a concurrent vote of both houses of the General Assembly; but a majority of all the members elected to each house must concur in such vote, and the cause of removal shall be entered on the journal of each house. The judge against whom the General Assembly may be about to proceed shall have notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon."

Without undertaking to review the history of its adoption, or to cite any of the cases in which it has been proceeded under, it is the purpose of this article to contend that the section as it stands, clearly contemplates a purely legislative proceeding,

which is not analagous to or to be assimilated to a judicial procedure or a trial in any sense.

In the first place it should be remembered that the legislative and judicial departments of the State government are entirely distinct and separate. The Legislature is in no sense a court, and for it to attempt to act as one, would bring about insurmountable difficulties. There is only one case in which either branch of the General Assembly acts as a court, and that is especially provided for in § 54 of the Constitution, which relates to the impeachment of certain officers, including judges. This latter section provided that one of these officers offending against the State by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor, may be impeached by the House of Delegates and *prosecuted* before the Senate, which shall have the sole power to *try* impeachments. When sitting for that purpose the senators shall be on oath or affirmation, and no person shall be *convicted* without the concurrence of two-thirds of the senators present. *Judgment* in case of impeachment shall not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the state. The Senate may sit during the recess of the General Assembly for the *trial* of impeachments. It is a constitutionally appointed tribunal to try one particular class of cases. There is, however, no other instance in which either branch of the Legislature in any way acts in a manner to be assimilated to that of a court, and the very fact that § 104 is provided in addition to § 54 shows that an entirely different procedure is contemplated. This view is borne out by the difference in the language of the two sections, for while the language of § 54 clearly contemplates a trial the language of § 104 as clearly contemplates a purely legislative proceeding, and there is nothing in the language of § 104 in any way suggestive of a trial.

Those who take the opposite view contend, however, that the provisions that judges may be removed for "cause," and that "the judge against whom the General Assembly may be about to proceed, shall have notice thereof accompanied by a copy of the causes alleged for his removal at least twenty days before the day on which either house of the General Assembly shall act thereon", indicate that the accused judge shall be given an oppor-

tunity to be heard in his own behalf. It is true that these provisions mean something. They do not mean, however, that he is entitled to a trial in any sense of the word.

The words "for cause", without any qualification thereto, leave the determination of what constitutes sufficient cause to the Legislature, and any cause which the Legislature in its wisdom may deem sufficient may be taken as sufficient cause, and no court would have the right to review the action of the Legislature in determining that question. "Cause" is what the Legislature says is "cause," unless it be so manifestly frivolous as to shock the conscience, in which case it might be subject to review on the ground that the constitutional rights of the accused have been impaired, but it is open to question as to whether or not even this sort of action could be reviewed by a court.

The object of allowing the accused judge twenty days notice is not to give him an opportunity to prepare for trial, but only to give him an opportunity to make answer. If his answer contains matter which in the judgment of the Legislature constitutes a sufficient defense, it may then, if it think proper, refuse to remove him, or it may order an investigation by a committee in order to inform itself upon the alleged matters of defense; but the whole question of whether he will be removed or not removed, investigation or no investigation, is left to the Legislature, who in that, as in all other respects, possess the sovereign power of the people, except in so far as it may be expressly limited by the Constitution.

The makers of the Constitution doubtless considered that they had sufficiently safeguarded the rights of an accused judge, when they provided that he should not be removed from office except for cause; that he could only be removed by concurrent vote of the majority of the members elected to both houses; that the alleged causes for the removal must be entered upon the journals of both houses, and that the accused should have twenty days notice in order to give him time to make answer.

As to substantive matter, it is clearly presumed by § 104 that the representatives of the people may be trusted with the authority to decide what is sufficient cause for removal of a judge, and will not act unjustly in removing one from office without sufficient cause, and that they may also be trusted to decide whether or not the answer of the judge contains sufficient matter

to make them pause, and require them either to refuse to remove, or to investigate further before doing so.

As to procedure, if the Legislature should fail to:

First, have a concurrent vote of both houses with a majority of all the members elected to each house concurring in such vote; or

Second, enter the cause of removal on the journal of each house; or

Third, give the judge, against whom it is about to proceed, twenty days notice before the action of either house in taking the vote, then and only then would the removal be illegal; but when these three requisites of procedure are complied with, and the General Assembly by voting affirmatively decides that "cause" exists, the matter is ended, and it is beyond the power of any court to say that any right of the accused has been invaded, or that he has not been removed according to law.

The General Assembly has a right to obtain its information in regard to removal of judges, as in any other legislative matter, from any source, and through any channel whatsoever. It is not bound by forms of procedure or rules of evidence. It does not have to have an investigation as to fitness of a judge before electing him, nor before removing him. It acts in a legislative manner to elect him, and in a legislative manner to remove him. If a member of the Legislature is convinced that a judge should be removed, he should vote to remove him whether he obtains his conviction upon the subject from a committee report, from his individual knowledge of the matter, or from outside information.

Matters of even greater importance are acted upon by the Legislature, matters affecting the lives, liberties and welfare of the citizens of the entire Commonwealth, in many instances, without even a committee report, and no matter how important the law enacted or the resolution passed, it would not be contended by anyone that a court could set it aside, because in the opinion of the Court it had been enacted or passed without sufficient investigation.

If it be conceded that the Legislature must give an accused judge a trial before removing him. innumerable entanglements would arise, from which it would be well nigh impossible for

the Legislature to extricate itself. If a trial is to be had, how is it to be conducted? Are both houses to set together or separately? If separately, must both houses hear all the evidence? Must they act in open session, or may the trial be conducted by a committee? If by a committee, shall it be a joint committee, or a committee of one of the houses? If a committee of one house then of which one? Or must a committee of each house acting independently go through the entire trial? If it is to be a trial, then in the absence of material witnesses, or the sickness of the defendant, or other cause usually deemed sufficient in a court, justice would require that the case be continued. It would be easy, therefore, to prolong the matter beyond the time for the Legislature to sit, and as it cannot act during the recess, as the Senate may in case of impeachment, it might thus be in the power of any judge to prevent his removal, except by impeachment.

It is submitted, therefore, that when it is proposed to remove a judge, the Legislature has only to satisfy itself of the sufficiency of the cause, and of the fact that the cause exists, which it may do in any way it sees fit, and then by complying with the procedure above outlined, it may remove him and its action is final.